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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 93

HENRY T. McKINNEY, PETITIONER,

vs.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petition for certiorari filed March 21, 1957.

Certiorari granted May 6, 1957.

OCTOBER TERM, 1957

No. 93

HENRY T. McKINNEY, PETITIONER,

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THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, ET AL.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 5436

HENRY T. McKINNEY,
Appellant,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, Freight Handlers, Express and Station Employees,
Appellees.

Statement of Points on Appeal—Filed July 9, 1956

The points upon which Appellant will rely are:

1. The District Court erred in concluding that Section 9 of the Universal Military Training and Service Act of 1951, 65 Stat. 75, 50 U. S. C. App. 459(c), did not entitle appellant, upon his return from military service, to seniority in the advance position he then received from the date he would have obtained that advanced position had he remained in the continuous employ of the appellee employer.

2. The District Court erred in concluding that appellant was not entitled, by virtue of Section 9 of the Universal Military Training and Service Act of 1951, to a seniority date in Group I Seniority Classification of either September 8 or September 10, 1952.

3. The District Court erred in dismissing appellant's complaint on the ground that it failed to state a claim upon which relief could be granted against the appellee employer.

FRANK D. McSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant United States Attorney,
Attorneys for Appellant.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 3945, Civ.

HENRY T. McKINNEY,

Plaintiff,

vs.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, Freight Handlers, Express and Station Employees,

Defendants.

Complaint—Filed June 3, 1955

Comes now the plaintiff, Henry T. McKinney, appearing by Frank D. McSherry, United States Attorney for the Eastern District of Oklahoma, acting by direction and on authority of the Attorney General and for complaint against the defendant, The Missouri-Kansas-Texas Railroad Company, alleges and states:

I. That this Court has jurisdiction by reason of this being an action brought under 50 U. S. C. A. Appendix 459; that the plaintiff resides in Muskogee, Oklahoma; that the defendant is a corporation doing business in the Eastern District of Oklahoma.

II. That on or about August 1, 1925, the defendant and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees entered into an agreement known as "Agreement between the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas, and all that class of clerical, office, station and storehouse employees thereon represented by Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees"; that said agreement was effective from August 1, 1925, and thereafter and continues in effect at the present date. A true copy of said agreement is attached hereto marked Exhibit "A" and made a part of this complaint.

III. That plaintiff is an affected employee within the meaning of Rule 1 of said Agreement, and that plaintiff was an employee of the defendant on September 25, 1950, in the capacity of Relief Clerk-Chief Caller, which was a position other than temporary and was a position within Group 2 Classification of said Agreement.

IV. That plaintiff left said employment for the purpose of training and service in the Armed Forces of the United States on September 26, 1950, and continued to serve therein until separated therefrom on September 25, 1952; that at the time of such separation, plaintiff received a certificate showing that he had satisfactorily completed his period of training and service. A true copy of said certificate is attached hereto, marked Exhibit "B" and made a part of this complaint.

V. That under 50 U. S. C. A. Appendix 459, plaintiff is considered as having been on leave of absence during his period of training and service; that under Rule 15 of said agreement, an employee returning to defendant's employ after a leave of absence may return to his former position or may exercise seniority rights to any position bulletined during his absence; that under Rule 1(3)(A) of said agreement, employees in Group 2 Classification are entitled to preference over non-employees in the assignment to positions in Group 1; that during plaintiff's absence, a Group 1 position of Bill Clerk was bulletined by the defendant at the Muskogee Freight Station on September 8, 1952, in accordance with Rule 10 of said Agreement; that one R. B. Fabian, a non-employee, was assigned to that position on September 15, 1952; that during plaintiff's absence a Group 1 position of Assistant Cashier was bulletined by the defendant at the Muskogee Freight Station on September 10, 1952, in accordance with Rule 10 of said Agreement; that one G. B. McCuan, a non-employee, was assigned to that position on September 22, 1952; that plaintiff was unable to file an application for either of said positions by reason of his absence for the purpose of training and service; that plaintiff was, therefore, at the time of his return to defendant's employ, entitled to exercise his seniority rights and place himself in the position of Bill Clerk

or in the position of Assistant Cashier. in accordance with Rule 1(3)(A) of said Agreement.

VI. That plaintiff, on October 1, 1952, made application to defendant for reemployment and was accordingly reemployed on August 2, 1952, and was permitted to place himself in the position of Assistant Cashier; that plaintiff was assigned a seniority date in Group 2 of October 7, 1952; that plaintiff duly protested that said seniority date was incorrect; that said seniority is, in fact, incorrect; that plaintiff's seniority date should be September 10, 1952, the date on which the position of Assistant Cashier was bulletined, or September 8, 1952, the date on which the position of Bill Clerk was bulletined.

VII. That plaintiff continued to serve in the position of Assistant Cashier until said position was abolished on September 4, 1953; that plaintiff, on September 2, 1953, duly requested that he be permitted to exercise his seniority rights and place himself in the position of Bill Clerk in accordance with Rule 23 of said Agreement; that plaintiff's request was rejected by the defendant; that plaintiff duly protested said rejection; that said rejection was due solely to the fact that plaintiff's incorrectly signed seniority date of October 7, 1952, made him a junior employee to R. B. Fabian, whose seniority date was September 15, 1952; that if plaintiff had been assigned a correct seniority date of September 10, 1952, or September 8, 1952, plaintiff would have been a senior employee to R. B. Fabian and plaintiff's request would not have been rejected; that plaintiff has at all times since September 4, 1953, been qualified to perform the duties of Bill Clerk.

VIII. That after plaintiff's request was rejected, plaintiff was reemployed as Relief Clerk Chief Caller and has been retained in that position since September 5, 1953; that plaintiff has been damaged in the sum of $10.08 per week since September 5, 1953, for earnings lost by reason of defendant's wrongful refusal to permit plaintiff to place himself in the position of the Bill Clerk.

Wherefore, plaintiff prays this Honorable Court to order defendant to assign plaintiff a seniority date of September 10, 1952, or September 8, 1952, in accordance with Para-

graph VI of this Complaint, and to permit plaintiff to place himself in the position of Bill Clerk, and to award plaintiff damages in the amount of $10.08 per week from September 5, 1953, until such time as plaintiff is permitted to place himself in the position of Bill Clerk, and for such retirement, sickness, and unemployment benefits and credits as plaintiff would have been entitled to in Group 1, and for such other benefits and relief to which plaintiff may be entitled, and for the United States of America to recover the costs of this action.

FRANK D. MCSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant United States Attorney.

Exhibit A to Complaint

Agreement between the Missouri-Kansas-Texas Railroad Company, Missouri-Kansas-Texas Railroad Company of Texas and all that class of clerical, office, station and storehouse employees thereon represented by Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Effective August 1, 1925 with Revisions to December 1, 1951.

Hours of Service and Working Conditions Governing Employees Named Herein.

Rates of Pay. * * *

Employes Affected—Rule 1. * * *

(1) Clerks, Sub-Formen, Assistant Foremen, Sub-Storekeepers, City Ticket Agents (Traffic Department).

Qualifications—Clerks-Employees who regularly devote not less than four (4) hours per day to the writing and calculating incident to keeping records and accounts, dictating letters, vouchers, bills, statements, reports, and similar work, including employes who examine or verify such work, also typists, comptometer operators, and calculating machine operators, shall be designated as clerks.

(2) Other office and station employes, such as office boys, messengers, helpers, train announcers, gatemen, baggage and parcel room employees, train and engine crew callers, operators of office or station equipment devices, telephone switchboard operators, elevator operators, ticket and way-bill assorters, machine operators, employes operating appliances or machines for perforating and addressing envelopes, numbering claims or other papers.

(3) Station, platform, warehouse, transfer, dock, store room, stock room and team track freight or material handlers or truckers, and others similarly employed; car sealers, scalers, fruit and perishable inspectors, stowers, stevedores, breakouts, loaders, locators, coopers, and other similarly employed; and laborers employed in and around stations, offices, storehouses, and warehouses.

(A) Rules of this agreement as herein written will apply to employes in group two (2). Promotion will be confined to the group herein named, with the exception that employes on positions enumerated in group two (2) will be given preference over nonemployes in the assignment to positions in group one (1), based upon fitness and ability, after the provisions of rule six (6) of this agreement have been complied with, in relation to employes embraced in group one (1). * * *

(C) Seniority of employes will be restricted to the respective group in which employed, except that seniority accumulated in groups two (2) or three (3) will be recognized in reduction of forces in the event employes holding seniority in group two (2) or three (3) positions, are laid off account of reduction in forces, such employes will be privileged to exercise their seniority in groups from which promoted. * * *

SENIORITY

Seniority Datum—Rule 4.—Seniority begins at the time the employe's pay starts in the respective branch or class of service and on the seniority district on which employed, transferred, or promoted, and when employes are assigned to positions as provided for in Rule 10, of the agreement, or other rules which presuppose regular employment. * * *

Bulletin—Rule 10.—New positions or vacancies will be promptly bulletined in places accesible to all employes affected, for a period of five (5) days in the seniority district where they occur. Bulletin to show location, title, hours of service, and rate of pay. Employes desiring such positions will file their application with the designated official within that time, the name of the successful applicant will be posted for a period of five (5) days where the position was bulletined and a copy furnished to interested chairmen. This rule does not apply to employes in group three (3) of Rule 1.

Under this rule positions should be bulletined for bid not later than three (3) days after position has been vacated by regularly assigned employe.

Physical assignment to positions which have been bulletined for bid will be made not later than three (3) days after the expiration of the time limit under this rule, except where longer period is required extension will be made by agreement between the carrier and local or division chairman, representatives of employes. * * *

Bidding After Absence—Rule 15.—An employe returning after leave of absence may return to former position or may, upon return or within three (3) days thereafter, exercise seniority rights to any position bulletined during such absence. Employes displaced by his return may exercise their seniority in the same manner. * * *

Positions Abolished—Rule 23.—Employes whose positions are abolished may exercise their seniority rights over junior employes, and other employes affected may exercise their seniority in the same manner, subject to the provisions of Rules five (5) and eighteen (18).

Employes who exercise seniority account of reduction in force or positions abolished will within seven (7) days from such date notify the supervising officer of their desire to exercise their seniority on a position occupied by a junior employe. The supervising officer will within three (3) days either accept or reject the application of the employe desiring to exercise seniority.

Employes whose application to exercise seniority has been rejected will within three (3) days designate his

second choice, and his application will be considered in accordance with the provisions of these rules.

Employes whose applications to exercise seniority have been rejected may appeal in accordance with Rule 31 of the agreement.

An employes whose application to exercise seniority has been rejected and who designates a second choice does not lose the right to appeal as provided for in Rule 31.

Any employe whose position has been abolished, or who is displaced as result of force reduction, desiring leave of absence, will, prior to being granted a leave and within seven days after abolishment or displacement, designate in writing the position upon which he desires to place himself. The employing official, will upon such notification notify the employe affected. The employe affected may if he so desires exercise seniority in accordance with prevailing rules, or he may retain the position held by him during the time that the employe granted the leave is absent from the position. Upon return of employe granted the leave, the employe displaced may exercise seniority.

In the event the employe granted the leave fails to return at expiration of same, the employe holding the position will be considered as having never been displaced. * * *

DISCIPLINE AND GRIEVANCES

Investigation—Rule 27.—An employe who has been in the service more than sixty (60) days shall not be disciplined or dismissed without just cause and upon written request made upon the disciplining officer or agent, within seven (7) days from the date of notification of discipline or dismissal, shall be given an investigation, at which investigation he may have a representative of his choice. He may, however, be held out of service pending such investigation. The investigation shall be held within seven (7) days of the date such request is received. A decision will be rendered within seven (7) days after the completion of the investigation.

Hearing—Rule 28.—An employe dissatified with the decision rendered in connection with the investigation shall

have a fair and impartial hearing before the next proper officer, provided written request is made to such officer and a copy furnished to the agent or officer whose decision is appealed within seven (7) days of the date of the advice of the decision. Hearing shall be granted within seven (7) days after such request is received and a decision rendered within seven (7) days of the completion of hearing.

Appeal—Rule 29.—If an appeal is taken from this hearing it must be filed with the next higher official, and a copy furnished the official whose decision is appealed within seven (7) days after the date of the decision.

Further Appeal—Rule 30.—If further appeal is taken it must be filed as provided in Rule twenty-nine (29), within twenty (20) days of date of the decision appealed. On such appeal decision shall be rendered as promptly as possible.

Grievances—Rule 31.—An employe who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for above, if written request is made to his immediate superior within seven (7) days of the cause for complaint.

Representation—Rule 32.—At the hearing, or on the appeal, the employe may be assisted by one or more representatives of his choice.

Right of Appeal—Rule 33.—The right of appeal by employes or their representatives in the regular order of succession, and in the manner prescribed, up to and inclusive of the highest official designated by the Railway, to whom appeal may be made, is hereby established. * * *

IN UNITED STATES DISTRICT COURT

Amendment to Complaint—Filed September 12, 1955

Comes now the plaintiff, Henry T. McKinney, by Frank D. McSherry, United States Attorney for the Eastern District of Oklahoma, and as a matter of course in accordance with Rule 15(a), Federal Rules of Civil Procedure, amends Paragraph VI of the Complaint in this action so that the said Paragraph VI will read as follows, to-wit:

VI. That plaintiff, on October 1, 1952, made application to defendant for reemployment and was accordingly re-

employed on October 7, 1952, and was permitted to place himself in the position of Assistant Cashier; that plaintiff was assigned a seniority date in Group I of October 7, 1952; that plaintiff duly protested that said seniority date was incorrect; that said seniority is, in fact, incorrect; that plaintiff's seniority date should be September 10, 1952, the date on which the position of Assistant Cashier was bulletined, or September 8, 1952, the date on which the position of Bill Clerk was bulletined.

FRANK D. MCSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Filed Sept. 12, 1955.

IN UNITED STATES DISTRICT COURT

Motion to Dismiss—Filed June 23, 1955

Comes now the defendant, Missouri-Kansas-Texas Railroad Company, and moves the Court to dismiss this action, and as grounds for said motion would respectfully show:

I. The Court lacks jurisdiction over the subject matter of this action because, although plaintiff's complaint alleges that jurisdiction is predicated on a question arising under Section 50 U. S. C. A. Appendix 459, the complaint shows on its face that no question is presented which arises under the laws of the United States, or otherwise within the jurisdiction of the Court. The complaint shows on its face that upon entering military service, plaintiff held seniority in Group 2, and under the provisions of Rule 1(3)(A) of the labor agreement mentioned in numerical paragraph II of the complaint, promotion to Group 1 is based on fitness and ability rather than upon seniority, and plaintiff had and has no rights to re-employment except in Group 2. The complaint shows on its face that upon being relieved from active duty and military service, the plaintiff was re-employed by defendant, and was granted all re-employment rights to which he was entitled under said act of Congress. Plaintiff's complaint shows that his cause of action, if any, is not under said act

of Congress or for its violation, but is for breach of contract, which action is within the exclusive primary jurisdiction of the Third Division of the National Railroad Adjustment Board, 45 U. S. C. A. 153, First (H) (I) (J) (M) (N) (O) (P).

II. The complaint fails to state a claim upon which relief can be granted against the defendant, in that:

(a) The seniority rights of plaintiff are fixed and determined under the labor agreement mentioned in numerical paragraph II of the complaint. Plaintiff's seniority status and date is controlled by Rule 1(3)(C) and Rule 4 of said agreement, and is and was correctly determined as September 1, 1949, in Group 2, and October 7, 1952, in Group 1.

(b) That R. F. Fabian has a seniority status superior to that of the plaintiff, and is not subject to displacement by plaintiff.

III. Plaintiff has failed to join indispensable parties, namely R. F. Fabian and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, who should be parties to this action to the end the rights of all essential parties may be determined, and final decision herein will be binding on all parties who could or may be affected thereby.

That it appears from the complaint that R. F. Fabian, who resides at 712 North "F" Street, Muskogee, Oklahoma, now has a seniority status superior to that of the plaintiff. That R. F. Fabian is a real party in interest, and a necessary and indispensable party to this cause, for the reason the determination of this cause in favor of the plaintiff would deprive R. F. Fabian of his seniority status superior to plaintiff, and prejudice his rights.

That it appears from the complaint that Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes is a real party in interest, and an indispensable and necessary party to this cause, for the reason said organization negotiated the labor agreement mentioned in the complaint, is responsible to all its members, including plaintiff, for the protection and enforce-

ment of rights thereunder, and said agreement will, of necessity be interpreted and construed in deciding this cause.

DAN M. WELCH,
Attorney for Defendant.

Filed June 23, 1955.

IN UNITED STATES DISTRICT COURT

Motion of Brotherhood to Intervene—Filed August 19, 1955

Comes now the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and under Rule 24(a) of the Federal Rules of Civil Procedure does move the Court to grant it permission to intervene in this action for the reason that this applicant has a real and substantial interest in the subject matter of this proceeding and the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in this action. For grounds for this motion your applicant states the following:

1. The applicant is an unincorporated voluntary association with its principal office and place of business in the City of Cincinnati, State of Ohio. It is a national railway labor organization, properly organized in accordance with the provisions of the Railway Labor Act, 45 U. S. C. A. 153 *et seq.*

2. Your applicant is the properly and lawfully designated collective bargaining representative of the class of clerical, office, station and storehouse employees of the Missouri-Kansas-Texas Railroad Company of Texas. Said clerical, office, station and storehouse employees are members of the said Brotherhood. Your applicant heretofore has made an agreement with respect to hours, rates of pay, seniority and other conditions of employment concerning the class of clerical, office, station and storehouse employees of the defendant railroad on August 1, 1925, which agreement remains extant and binding between the parties, together with such miscellaneous amendments as have been made since that date. This applicant, together with its many members and the individuals who constitute the

class of clerical, office, station and storehouse employees on the defendant railroad, have a real and substantial interest in the enforcement, application, operation and proper interpretation by properly designated authorities and tribunals of the aforementioned agreement as amended, all as provided for by law under the terms and provisions of the Railway Labor Act, 45 U. S. C. A. 151. This applicant is an essential and indispensable, necessary and required party herein and a real party in interest.

3. The complaint purports to state a cause of action which involves a dispute growing out of a grievance and out of the interpretation and application of said agreement and requires interpretation and adjudication of the rights of the plaintiff and of others under the terms and provisions of the aforementioned contract. *Inter alia* the complaint requires that this Court consider, interpret and adjudicate said agreement, and more particularly Rule 1(3)(a), Rule 10, Rule 23, and other sections of said agreement. Said petition requires that this Court make a determination with respect to the seniority status and other rights of the plaintiff, and, therefore, the rights of the applicant and of other members of the class of clerical, office, station and storehouse employees, not parties herein, would be involved and are involved. Furthermore, your applicant respectfully submits that the interpretation of said agreement as sought by the plaintiff is incorrect, improper and unlawful.

4. Your applicant respectfully submits that this Court lacks jurisdiction over the subject matter and the parties herein, that the complaint does not state a cause of action upon which relief can be granted under 50 U. S. C. A. or otherwise, that the subject matter of this action lies within the exclusive jurisdiction of the National Railroad Adjustment Board under the Railway Labor Act, 45 U. S. C. A. 151 *et seq.*, and accordingly for those reasons this cause should be dismissed. It is the prayer of your applicant that it be permitted to file a motion to dismiss in this action and fully to intervene under Rule 24(a) of the Federal Rules of Civil Procedure.

Wherefore, the premises considered, your applicant prays that it be permitted to intervene herein and to file its motion to dismiss in the form attached hereto.

CARROLL J. DONOHUE,
SALKEY & JONES,
A. CAMP BONDS,
Banker, Bonds & Wilcoxen.

Filed Aug. 19, 1955.

IN UNITED STATES DISTRICT COURT

Clerk's Note Re Intervention—September 1, 1955

Clerk's Note: On September 1, 1955 the court entered an order as follows, to-wit: "Entering Order permitting the Brotherhood of Railway and Steamship Clerks, etc. to intervene herein." (Rice)

No formal journal entry was ever prepared and presented to the Court for signature and filing in the case.

IN UNITED STATES DISTRICT COURT

Motion of Brotherhood to Dismiss—Filed September 1, 1955

Comes now the intervenor, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and respectfully moves the Court to dismiss this action for the following reasons:

1. Plaintiff's complaint reveals on its face that this Court lacks jurisdiction over the alleged and purported subject matter thereof and described therein because:

a) The alleged matter in controversy does not arise under the constitution and laws of the United States;

b) Exclusive jurisdiction to adjudicate the matters described in plaintiff's complaint is vested by the Railway Labor Act, 45 U. S. C. A., Section 151 *et seq.*, in the National Railroad Adjustment Board, the awards of which may under said Railway Labor Act be reviewed exclusively in statutory suits for enforcement and exclusively in certain District Courts of the United States, all as is provided and designated in said Railway Labor Act.

2. The plaintiff's complaint states no cause of action under 50 U. S. C. A., Appendix 459, and this action is improperly purportedly brought thereunder.

3. The Court lacks jurisdiction over the parties herein.

4. R. F. Fahian, a real party in interest and a necessary and indispensable party to this cause whose rights would be prejudiced and determined by a judgment of this Court herein, has not been made a party to this action.

5. With respect to plaintiff's purported claim for damages and other relief, it is apparent on the face of plaintiff's complaint that plaintiff has failed to state a claim upon which relief can be granted and that plaintiff has failed to state or plead facts indicating liability of the defendant to plaintiff, or any legally recognizable damage sustained by plaintiff which is recoverable by plaintiff, or any legally recognizable right to relief.

Wherefore, the premises considered, this defendant prays that plaintiff's complaint and his purported cause of action be dismissed.

CARROLL J. DONOHUE,
SALKEY & JONES,
A. CAMP BONDS,
Banker, Bonds & Wilcoxen.

[Verified.]
Filed Sept. 1, 1955.

IN UNITED STATES DISTRICT COURT

Order Sustaining Motion to Dismiss—March 14, 1956

On this the 14th day of March, 1956, there comes on for consideration the motion to dismiss filed herein on behalf of the defendant and also on behalf of the intervenor. Said motions have been presented by written briefs, and each of said motions asks for dismissal upon three separate grounds: (1) That the Court lacks jurisdiction over the subject matter, (2) That the plaintiff has failed to join indispensable parties, (3) And that the complaint fails to state a claim upon which relief can be granted against the defendant.

After consideration of the briefs filed herein and the law as presented by the parties, the Court is of the opinion that the motions should be sustained, not for lack of jurisdiction nor for a failure to join indispensable parties but for the reason that plaintiff's complaint fails to state a claim for which relief can be granted against the defendant.

It is therefore ordered, adjudged, and decreed that the motion of the defendant, Missouri-Kansas-Texas Railroad Company, and the motion of the intervenor, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, be and the same are sustained and plaintiff's complaint is dismissed.

EUGENE RICE, *Judge.*

Filed March 14, 1956.

IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed April 10, 1956

Notice is hereby given that Henry T. McKinney, plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Order Sustaining Motion to Dismiss for failure to state a claim upon which relief can be granted against the defendant, which order was entered in this action on March 14, 1956.

FRANK D. MCSHERRY,
United States Attorney,

PAUL M. BREWER,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

Filed April 10, 1956.

IN UNITED STATES DISTRICT COURT

Note Re Order Extending Time for Docketing

[By order of May 10, 1956, the time for docketing the cause in the Court of Appeals was extended to July 9, 1956.]

Clerk's Certificate to foregoing transcript (omitted in printing).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5436—November Term, 1956.

HENRY T. MCKINNEY,

Appellant,

vs.

THE MISSOURI-KANSAS-TEXAS RAILROAD COMPANY AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, Freight Handlers, Express and Station Employees,

Appellees.

Appeal from the United States District Court for the Eastern District of Oklahoma

Opinion—December 22, 1956

Alan S. Rosenthal (George Cochran Doub, Ass't Attorney General, Frank D. McSherry, United States Attorney, and Samuel D. Slade were with him on the brief) for Appellant.

Dan M. Welch and Carroll J. Donahue (Wayne R. Howell, M. E. Clinton, Salkey & Jones, and Banker and Bonds were them on the brief) for Appellees.

Before BRATTON, Chief Judge, HUXMAN and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

Henry T. McKinney, an honorably discharged veteran, brought this action against the Missouri-Kansas-Texas Railroad Company to enforce alleged employment rights under § 9 of the Universal Military Training and Service

Act of 1951, 50 U. S. C. Appendix § 459. The Union was granted leave to intervene on its own motion. He appeals from the judgment of the Court dismissing his complaint on the grounds that it failed to state a claim upon which relief could be granted.

In his complaint McKinney alleged a collective bargaining agreement dated August 1, 1925, was still in effect, between M-K-T and the Union, of which he was a member; it was claimed that this agreement gave him rights for advancement upon his return from the service under the interpretation of the Act. The contract provides for three classes of employees, Groups 1, 2 and 3. Each Group has its own seniority schedule. At the time of his induction into the service McKinney was an employee of Group 2. Rule 15 of the contract provides that a worker returning after a leave of absence may return to his former position or exercise seniority rights to any position "bulletined" during his absence. Rule 1(3)(A) provides that employees in Group 2 are entitled to promotions to Group 1 in preference over non-employees, "based upon fitness and ability." Rule 4 provides that upon such promotion seniority begins at the time the employee's pay starts in the respective class of service when employees are assigned to positions as provided for in Rule 10. It is by Rule 10 procedure that McKinney claims he is being denied his rights under the Act. There it is provided that vacancies will be bulletined in places easily accessible to employees and after applications are received the name of the successful applicant would be posted. Rules 1(3)(C) and 23 provide that within the respective Groups seniority might be exercised by employees whose jobs had been abolished. Grievances regarding rejection of seniority demands in that event were provided for by appeals.

On September 8 and 10, 1952, while McKinney was still in the service two positions in Group 1 were bulletined. The first was the position of bill clerk, given to R. B. Fabian on September 15, 1952, and the other was assistant cashier, given to G. B. McCuan on September 22, 1952. Both of these men were non-employees. Upon his discharge from the military on September 25, 1952, McKinney applied for re-employment and was rehired on October 2,

1952, as assistant cashier in Group 1, and was given C. B. McCuan's job.

It is McKinney's contention that when he returned he was entitled to exercise his seniority rights and place himself in the position of bill clerk, the position held by Fabian, in accordance with Rule 1(3)(A) of the contract. When he was given C. B. McCuan's position his seniority in Group 1 was dated as of October 7, 1952. He protested claiming that his seniority should be dated either September 8 or 10, 1952, when the vacancies were first bulletined. He continued to serve as assistant cashier, however, under the protested arrangement until the job was abolished on September 4, 1953. Thereupon he reasserted his contention that he deserved higher seniority than R. B. Fabian and sought to "bump" him on that basis, and this was denied by M-K-T on the basis of his earlier assigned seniority date in Group 1. He was reassigned to his position in Group 2 held prior to his induction into the service and has held it since September 5, 1953.

The appellee Union challenges the jurisdiction of the district court on two grounds. It is urged that in any event the National Railroad Adjustment Board was vested with primary exclusive jurisdiction [1] of the controversy between these parties; that appellant McKinney could not bypass the National Railroad Adjustment Board and seek relief in the federal district court. The Railway Labor Act [2] vests in the National Railroad Adjustment Board jurisdiction to interpret agreements and adjudicate issues between railroads and their employees. The National Railroad Adjustment Board is given broad jurisdiction to interpret agreements and adjudicate issues between railroads and their employees with appropriate and comprehensive administrative procedure provided for the discharge of such functions. But Section 9(d) of the Universal Military Training and Service Act, *supra*, expressly gives to any qualified and returning serviceman the right to insti-

[1] In *Slocum* v. *Delaware L. & W. R. Co.*, 339 U. S. 239, in footnote 7 the Court states: "Nor are we called upon to decide any question concerning judicial proceedings to review board action or inaction.

[2] 48 Stat. 1185, 45 U. S. C. A. § 151, *et seq.*

tute a proceeding in the United States Courts to require a former employer to comply with the provisions of the Act regarding preservation of re-employment and seniority rights. The mandate of the statute is clear and it does not condition the right to institute and maintain such an action upon prior exhaustion of the administrative procedure under the Railway Labor Act. Inasmuch as this type of labor dispute is peculiar to veterans and the statute specifically applies to veterans as a class, prior exhaustion of administrative procedures under the Railway Labor Act is unnecessary. The Railway Labor Act is general legislation dealing with labor disputes as such. The Universal Military Training and Service Act is a specific statute for the benefit of all veterans honorably discharged and regards itself with disputes arising from such status upon their return. Being a specific statute for the resolution of specific grievances, it must control.

It is next contended by the Union that the Court lacked jurisdiction because of the absence of an indispensable party, Fabian. It is contended that Fabian's rights are involved in this controversy and that, therefore, he is indispensable to a final adjudication. The 1951 Act, however, specifically provides "That only the employer shall be deemed a necessary party respondent to any such action." Under this clear provision of the statute a controversy of this kind is solely between the returned veteran and the former employer and no one else need be joined as a party litigant.[3] The Union places strong reliance on the decision of our Court in *Johnson* v. *Interstate Transit Lines*, 163 F. 2d 125. We did hold in that case that the other interested employees were indispensable parties. It is sufficient however to say that case is not controlling or in conflict with what we now hold, because it arises under the Act of 1940 which did not contain the provision of the 1951 Act quoted above or any similar provision.

On the merits we think the decision of the trial court is right. Section 9 of the Universal Military Training and Service Act merely guarantees the returning serviceman the seniority rights he would have had, had he not entered

[3] *United States* v. *Missouri-Kansas-Texas Railroad Co.*, 171 F. 2d 961; *Connor* v. *Pennsylvania Railroad Company*, 177 F. 2d 854.

the service. It does not create or vest in a veteran additional rights beyond what he would have had, had he not gone into the service.[4] This is sometimes referred to as the escalator principle. It simply means that all of his rights including seniority move on as though he had not left the employ of the company.

To determine where he would be had he not entered the service and had he remained with the company, we then must look to the bargaining agreement. The veteran is not to be penalized by reason of military service.[5] The collective bargaining agreement classifies the employees into three Groups. Under the agreement the rights of the employees predicated upon seniority are expressly confined to members within each Group, with the further provision that employees in Group 2 have a qualified right to advance to Group 1 when a vacancy occurs. In such case they are given preference to such advancement over non-employee applicants for the vacant spot in Group 1. This right is conditioned however under a determination that the employee seeking such advancement is fitted and qualified for such position. Had this vacancy occurred while McKinney was in the employ of the company, he would not have had the absolute right to demand either of these positions over the non-employee applicants. He could have demanded them only after a determination of fitness and qualification. The so-called escalator clause of the Act would carry forward only such established seniority rights as he had when he entered the service.

Under Rule 4 McKinney's seniority rights in Group 1 began when his pay started in that Group. His pay no dobut started on October 2, 1952, when he was rehired. It may be that his seniority in that Group began on that day rather than on October 7 when it was made to begin. It may also be that he was not entitled to "bump" McCuan because it would seem that his seniority was junior to that of McCuan's. But this was not an issue in the case. It is

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[4] *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278; *Fishgold* v. *Sullivan Drydock Repair Corp.*, 328 U. S. 275; *Meehan* v. *National Supply Co.*, 160 F. 2d 346; *Hewitt* v. *System Federation*, 161 F. 2d 545.

[5] *Trailmobile Company* v. *Whirls*, 331 U. S. 40.

apparent from what has been said that his seniority rights in Group 1 were in any event junior to those of Fabian and he was therefore not entitled to "bump" him when his job in Group 1 was abolished. The conclusion we have reached on the main issue of the case makes unnecessary consideration of the question of laches.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

Judgment—December 22, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Clerk's Certificate to foregoing Transcript (omitted in printing).

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari. Filed May 6, 1957.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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